SUPREME COURT, U.S.

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1272

G. I. DISTRIBUTORS, INC., ALVIN DRUSS, IRVING HERMAN,

Petitioners,

vs.

PATRICK MURPHY, Individually and in his Capacity as Police Commissioner of the City of New York,

FRANK S. HOGAN, Individually and in his Capacity as District Attorney of New York County,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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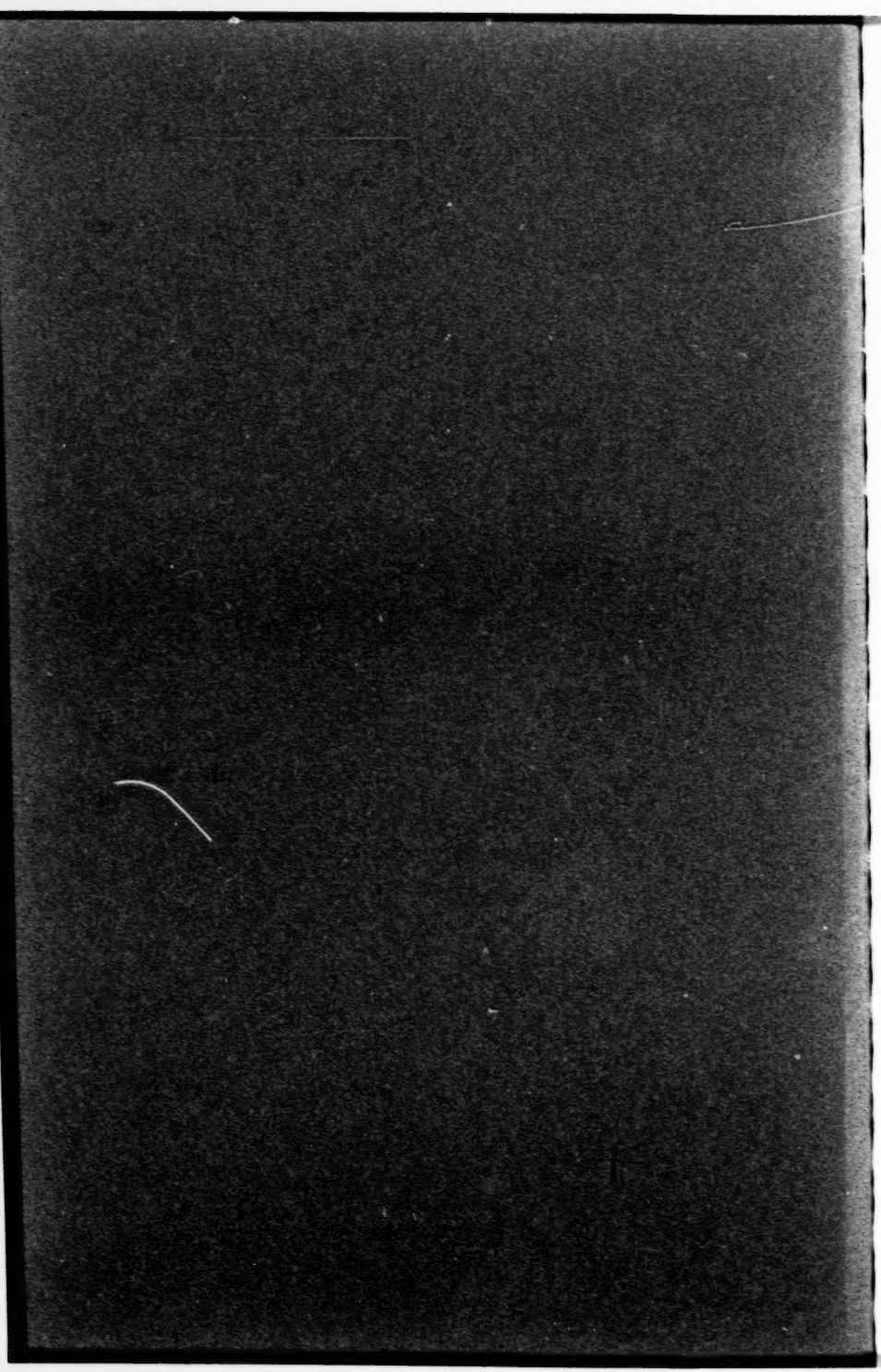


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The petitioners, G. I. Distributors, Inc., Alvin Druss and Irving Herman, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 20, 1973.

Opinions Below

This case was previously before the Court on a petition for a writ of certiorari (No. 72-872). The Court's memorandum is reported at 93 S.Ct. 3056 and is reprinted as Appendix A.

The Second Circuit Court of Appeals opinion dated December 20, 1973, attached as Appendix B, is still unreported. The Court of Appeals opinion of November 14, 1972, reproduced as Appendix C, is reported at 469 F.2d 752.

The District Court's opinion of January 19, 1972, attached as Appendix D, is reported at 336 F.Supp. 1036.

Jurisdiction

On January 19, 1972 the District Court, Weinfeld, J., in a §1983 proceeding, ordered the District Attorney to return all of G. I. Distributors' business books and records, as well as 19,000 magazines seized without a prior adversary hearing.

The Court of Appeals for the Second Circuit reversed the District Court order on November 14, 1972. The first petition for a writ of certiorari (No. 72-872) was granted. On June 25, 1973 the judgment was reversed and the case remanded to the Court of Appeals for further consideration in light of this Court's June, 1973 obscenity decisions. Despite the reversal, the Court of Appeals reaffirmed its original judgment of November 14, 1972 and sustained the massive seizure of 19,000 books without a prior adversary hearing.

This petition is timely filed, an extension having been granted by Mr. Justice Marshall on January 8, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the warrantless seizure of 19,000 magazines by the police, in addition to the taking of 330 needed for prosecution, without a prior adversary hearing, violated the petitioners' first amendment rights and authorized federal intervention under §1983 of Title 42.

Constitutional Provision Involved

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Statute Involved

42 U.S.C. §1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress."

Statement of Facts

On January 6, 1972 a raiding party of New York City police officers swooped down on G. I. Distributors,[1] armed with a search warrant naming 24 specific magazines, issued *ex parte* by a judge of the New York City Criminal Court (6).[2] The police burst into the premises and began to ransack G. I. Distributors' offices and warehouse (6). While on the premises, the police seized other magazines, not named in the search warrant, and collected them so that they could be viewed by another Criminal Court judge (6, 7).

Later that evening, the Hon. Peter J. McQuillan came to G. I. Distributors' premises and, without the consent of any of the principals of G. I. Distributors or its employees, entered the premises not open to the public. He examined these magazines, and signed the second search warrant authorizing the seizure of six copies each of another 32 magazines (6). Consequently, 330 of G. I. Distributors' magazines (six copies of each) were confiscated and taken under the authority of these two *ex parte* search warrants.

The police then without any authority confiscated *all* remaining copies of the 55 magazines named in these two warrants, totaling 19,000 books. The magazines were packed

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[1]G.I. Distributors, located in Long Island City, New York, distributes over 1,600 different books and magazines throughout the New York City area. Among the books it distributes is a complete line of paperbacks, published by such companies as Dell Publishing Company and Fawcett Publications, the Arco Instruction Books, the Civil Service Testing Series, and science fiction, adventure, detective, romance, and western novels (5). It also distributes popular movie, detective, sports, hot rod magazines and comic books, as well as music magazines such as Downbeat; a complete horoscope series and all the standard world almanacs (5). G.I. also distributes nudist and girlie magazines (5).

Numbers in parentheses refer to the Appendix in the United States Court of Appeals for the Second Circuit.

[2]Of the 24 magazines named in the first warrant, only 23 could be found on the premises. The warrant only authorized the seizure of six copies of each magazine designated.

into 221 cartons, and police guards were stationed with them around the clock (7).[3]

The search warrants provided in the most general language that the officers could seize virtually all the business records of G. I. Distributors (9). Acting under the broad authority of these warrants, the police officers plundered G. I. Distributors' offices. They took all its business records, including inventory records, cash receipt books, general ledgers, check books, payroll books, all receiving records, and all its accounts payable (9, 10). Full file drawers were taken out of G. I. Distributors' premises which contained company records of firms which supplied it with all its publications. Most of the publications had nothing to do with the 55 magazines which were the subject of the criminal investigation (10).

By day's end, all G. I. Distributors' books and records had been carted off, 19,000 magazines had been seized, and the company's president and secretary-treasurer (Alvin Druss and Irving Herman) had been arrested (7). Within 24 hours, G. I. Distributors was completely paralyzed and was unable to distribute even a single copy of the 1,600 different publications which it regularly circulates (13).[4]

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[3]The next morning the District Attorney belatedly offered an adversary hearing to the petitioners in the New York City Criminal Court. Petitioners complained that the court had no jurisdiction to make such a determination since they were charged with felonies and, further, that an adversary hearing had to *precede* a seizure of this magnitude. The prosecutor then sought to proceed under the New York Civil Practice Law and Rules §6330 which authorizes the New York Supreme Court to enjoin the sale or distribution of obscene material. The proceedings were adjourned over the weekend. On January 10, 1972 the Criminal Court determined the magazines to be obscene and, in excess of its jurisdiction, authorized their confiscation. Later, the magazines were carted off by members of the New York City Police Department.

[4]The very next day, on January 7, the police struck again. This time they assaulted Data Affiliates, Inc., a company associated with G.I. Distributors and located in the same building. They seized all of Data Affiliates' business records, including every one of its electromagnetic computer tapes used in servicing its other customers (11). Data Affiliates is a concern supplying computer services to

[Footnote continued on following page]

Federal Intervention

With their business left in ruins and threatened with extinction, petitioners took refuge in the United States District Court for the Southern District of New York. They carefully avoided any interference with the state prosecution. Invoking §1983 of Title 42, G. I. merely demanded that all their business records and the 19,000 magazines be returned. Petitioners cautiously avoided asking for the return of the 330 magazines needed by the prosecution as evidence in the state criminal action (16).

Occupying the procedural high ground in federal court, petitioners launched a full frontal assault against the massive nature of this seizure. They claimed that it did not comport with governing constitutional principles because it was not preceded by an adversary hearing.

The District Court's Decision

Within one week Judge Weinfeld directed the return of the 19,000 magazines unlawfully seized and all G. I. Distributors' books and records.[5] The court held: "For the purpose of determining prior restraint, the plaintiff G. I. Distributors had already been effectively prevented from distributing its wares and the public from reading them." (336 F.Supp. at 1037; D-3, *infra*; footnote omitted.) Judge Weinfeld declared: "Unlike a mere possibility of a 'chilling effect' on the First Amendment

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G.I. Distributors and other companies in the New York area. As a result of this crippling seizure, Data Affiliates was completely disabled (11). The actual value of the tapes and other records taken from Data Affiliates by the police was approximately $7,000 (12). The People never appealed that portion of Judge Weinfeld's order directing the return of Data Affiliates' books, records and computer tapes.

[5] *G.I. Distributors, Inc. v. Hogan*, 336 F.Supp. 1036 (S.D.N.Y. 1972); Appendix D, *infra*.

freedoms, here there was a complete and total restraint upon the operations of a magazine distributor, the overwhelming majority of whose distribution could not constitutionally be prevented even after an adversary hearing." (336 F.Supp. at 1039; D-5, *infra*: footnote omitted.)

The Court of Appeals Decisions

The People, appealing to the Second Circuit Court of Appeals, wisely abandoned any claim that the District Court was wrong in requiring it to return all G. I. Distributors' business records, and the books and electronic tapes of Data Affiliates. They complained only about returning the 19,000 books seized in addition to the 330 copies of the same magazines taken for the purpose of prosecution.

The court, dramatically divided, concluded that it was constitutionally permissible for the police to seize the 19,000 books without a prior adversary hearing.[6] It held that the procedures used were constitutionally adequate since a post-seizure hearing was afforded the petitioners.

Circuit Judge Feinberg dissented, emphasizing the qualitative difference between mass seizures of first amendment materials and the seizure of a few copies for use as evidence. Judge Feinberg's principal concern was that case-by-case decisions of this sort would seriously endanger first amendment freedoms.

On December 20, 1973, the circuit court, considering the case on remand, reaffirmed its former decision. The court, Judge Feinberg dissenting, held that seizure of the 19,000 magazines was constitutionally acceptable because an adversary hearing

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[6] *G.I. Distributors, Inc. v. Murphy and Hogan*, 469 F.2d 752 (2d Cir. 1972); Appendix C, *infra*.

was offered the petitioners after the seizure. Consequently, petitioners are forced once again to petition for certiorari.

Reasons for Granting the Writ

The Second Circuit's unprecedented decision approving the police seizure of petitioners' 19,000 books without a prior adversary hearing is in direct defiance of this Court's decisions in *Heller* v. *New York*, 413 U.S. , 93 S.Ct. 2789 (1973); *Roaden* v. *Kentucky*, 413 U.S. , 93 S.Ct. 2796 (1973); *Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961). Although this Court's obscenity decisions of June, 1973 dramatically changed the substantive law of obscenity, in the realm of police procedures used to seize first amendment materials, the law was left basically intact.

This Court, over a decade ago, in an attempt to fix certain ground rules for the two warring American constituencies — those who sell sexy books and those who would regulate what the rest of us may read — devised the prior adversary hearing. The Court decreed that before there can be any interference with the distribution of books, an adversary hearing must be conducted to determine whether or not the challenged publications are obscene. *Quantity of Books* v. *Kansas*, *supra*; *Marcus* v. *Search Warrants*, *supra*.

This principle has become deeply woven into the fabric of the first amendment. Following this Court's leadership, virtually every circuit court in the country embraced and enforced this doctrine.[7] The Second Circuit is the first and only court to

[7] For example, prior adversary hearings have been required in *Grove Press, Inc.* v. *City of Philadelphia*, 418 F.2d 82 (3d Cir. 1970); *Tyrone, Inc.* v. *Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger* v. *Pearcy*, 393 F.2d 202 (7th Cir. 1968); *United States* v. *Alexander*, 428 F.2d 1169 (8th Cir. 1970); *Demich, Inc.* v. *Ferdon*, 426 F.2d 643 (9th Cir. 1970).

break with this tradition and now stands alone against the rest of the nation.

The constitutional purpose of an adversary hearing intelligently conducted before the massive seizure of presumptively protected books is manifest. It provides a superior means of deciding the complicated issue of probable cause in an obscenity case where that decision must be made on the basis of a large volume of facts and law. As a practical matter, the adversary hearing is used as a means of supplying to the judicial officer publications found not obscene by high appellate courts which are similar to those sought to be seized. Once the magistrate is familiar with the material held not obscene by other courts, he is in a better position to decide whether or not the warrant should issue.[8]

In *Heller* v. *New York*, *supra*, this Court approved the confiscation of a *single film* for evidentiary purposes after a judge observed the film and issued a search warrant for its seizure. However, the Court carefully pointed out:

> "In this case, of course, the film was not subjected to any form of 'final restraint,' in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence*. There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself 'become a form of censorship,' even making the doubtful assumption that no other copies of the film existed." (93 S.Ct. at 2793)

In our case there was no authorization for the seizure of the 19,000 magazines, for the warrant only permitted the taking of six copies of each publication named. As a consequence, there

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[8] When an adversary hearing is avoided by the state, very often a magistrate issues a warrant for the seizure of books previously determined to be not obscene. As an example, in *People* v. *Abronovitz*, 62 Misc.2d 1069, 310 N.Y.S.2d 698 (Monroe Co.Ct., 1970), it was discovered after the seizure that three of the publications had been adjudicated not obscene in other courts.

was an unconditional restraint imposed upon the circulation of all these books for over a month.

Significantly, this Court in *Heller* galvanized its earlier holdings governing massive seizures established in *Marcus* and *Quantity of Books*.[9] Thus, this Court reinforced the adversary hearing rule relative to massive seizures. *Heller* only altered that rule to the extent that when the state seeks to prosecute a person criminally for the distribution of obscene materials, a limited seizure of the challenged material may be made for *evidentiary* purposes without a prior adversary hearing. Under those circumstances there is a minimal interference with the distribution of the questioned books and thus the determination of obscenity can await either a post-seizure hearing or the trial itself. However, if the state's objective is to abridge the circulation of a given work completely by destroying all of a distributor's books, a pre-seizure determination of obscenity is constitutionally required.[10]

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[9]The Court wrote:

> "Those cases [*Quantity of Books* and *Marcus*] concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held that, in those circumstances, a *prior* judicial determination of obscenity in an adversary proceeding was required to avoid 'danger of abridgement of the right of the public in a free society to unobstructed circulation of nonobscene books.' *Quantity of Copies of Books* v. *Kansas*, *supra*, 378 U.S., at 213 . . . (1964). *We do not disturb this holding.* Courts will scrutinize any large-scale seizure of books, films or other materials presumptively protected under the First Amendment to be certain that the requirements of *Quantity of Copies of Books* and *Marcus* are fully met. 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' [Citing authority.]" (93 S.Ct. at 2794; emphasis supplied; footnote omitted.)

[10]This Court emphasized in *Heller:*

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the

[Footnote continued on following page]

Here the District Attorney had acquired six copies of each magazine named in the warrants as evidence for the prosecution of his obscenity claims. The warrantless seizure of the additional 19,000 books, imposing a total restraint on their circulation, was concededly for the purpose of forfeiture.[11] Consequently, the narrow exception to the adversary hearing rule provided for in *Heller* has no application to this case. For in *Heller* this Court stressed:

> "... on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. *Otherwise, the film must be returned.*" (93 S.Ct. at 2795; emphasis supplied; footnotes omitted.)[12]

The Second Circuit's conclusion that G. I. Distributors was prevented from distributing its books for "a few hours" is woefully inaccurate. (Appendix B at B-4.) In fact, G. I. Distributors was foreclosed from distributing virtually *all* its publications because the police seized *all* of its business records, a fact regrettably overlooked by the circuit court. G. I.'s books and records and all of their computer tapes forcibly seized from

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seizure of the copy prevented continuing exhibition of the film." (93 S.Ct. at 2794-2795; footnote omitted.)

See Sooner State News Agency v. *Fallis*, F.Supp. (N.D. Okla., Dec. 3, 1973, 73-C-202), where a three-judge court, relying upon *Marcus* and *Quantity of Books*, ordered the return of all non-evidentiary copies of an entire warehouse of books and films seized by state authorities. The district court held that this Court's *Heller* decision permits only a limited exception to the prior adversary hearing requirement, and does not authorize massive seizures without a prior hearing on the question of obscenity.

[11] In the New York state proceedings, the District Attorney sought a warrant under §6330 of the Civil Practice Law and Rules which authorizes the destruction of any obscene material.

[12] *See Ricciardi* v. *Thompson*, 480 F.2d 167 (7th Cir. 1973).

Data Affiliates, Inc. were held for over a month.[13] It is most unfair for the Second Circuit to carve up this harrowing search and attempt to validate one part and ignore the other (the taking of all G. I. Distributor's books and records and Data Affiliates' computer tapes), which was conceded to be invalid. The search must be reviewed in its totality.

Judge Feinberg, upstaging the majority's logic, authoritatively pointed out:

> "The original warrants authorizing the taking of six copies of 56 magazines did not call for seizing *all* copies of the offending publications. To the extent that the seizure exceeded the specimens allowed by the warrants, it had *no* warrant authorization at all. . . . the Supreme Court held that warrantless seizures — such as occurred in the present case — were simply unconstitutional." (B-9)

Judge Feinberg went on to point out that:

> ". . . *Marcus* v. *Search Warrant*, . . . dealt with the seizure of thousands of magazines from a warehouse — just the kind of situation involved in the sequestration here. It is therefore clear that the 'urgency' claimed on these facts cannot, any more than the existence of 'cause,' justify the warrantless seizure of 19,000 publications, particularly since 'prior restraint' of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. [Citing this Court's opinion in *Roaden*.]" (B-10)

It is a serious insult to the scholarship of this Court to suggest that this high-handed confiscation of 19,000 books is authorized by *Heller*. When the prosecution elects to stop completely the distribution of all books, whether it be for a few days or for a

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[13] Judge Weinfeld's gripping description of this terrifying police seizure is worth reading and fully supports the conclusion that the business of G.I. Distributors, one of the largest distributors of magazines in New York, was crippled by this official seige. *See* Appendix D, *infra*.

month, such a disabling restraint must be preceded by an adversary hearing under the *Marcus-Heller* manifesto.

The token offer of an adversary hearing after all the damage is done is of little comfort to the victim of this official lawlessness.[14] We cannot resist stating that a major book distributor such as G. I. would not hide or burn 19,000 books sought by the police. These groundless fears expressed by the Second Circuit are unwarranted. With so much at stake, the petitioner would welcome a prior adversary hearing, for in the past it has usually prevailed on that question.

The devastation caused by the unleashing of this raw police power on book distributors cannot be tolerated in a free society. Assembled in our Appendix E is a catalogue of cases illustrative of this high incidence of police seizures and the inexcusable holding of books for long periods of time where ultimately they were returned or found to be protected. This sad list of cases critically demonstrates how a prior adversary hearing can balance the rights of the public to see and hear what they please with the state's right to prosecute obscenity. If a prior adversary hearing had been conducted in each of these cases, the inexcusable restraints imposed upon the distribution of protected books would have been avoided.

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[14] It bears repeating that the court in which the adversary hearing was belatedly offered the petitioners had no jurisdiction to hear this matter. *See Milonas* v. *Schwalb*, 65 Misc.2d 1042, 319 N.Y.S.2d 327 (Sup.Ct., N.Y.Co., 1971).

Conclusion

All that stands on the frontiers of the first amendment protecting the rest of us from this unforgivable police conduct of confiscating all of a merchant's books, is the prior adversary hearing. By terrorizing book distributors in this manner, the police become masters rather than servants of the law. If the Second Circuit's judgment condoning this conduct is allowed to stand uncorrected, more official lawlessness will undoubtedly be inspired. For it will only be a matter of time before other police agencies will swarm through this breach in the wall of the first amendment, rendered by the circuit court, and overrun other materials which are constitutionally protected. Today more than at any time in our history hostile forces are massed on the boundaries of this great amendment. If this breach in our Constitution is not immediately filled, free speech will suffer irreparable damage, and no book, film or magazine will be safe.

For all these reasons the writ of certiorari should be granted.

Dated: Buffalo, New York
February 18, 1974

Respectfully submitted,

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APPENDIX A

Supreme Court Memorandum
June 25, 1973

G. I. DISTRIBUTORS, INC., et al., petitioners, v. Patrick MURPHY, etc., et al. No. 72-872.

Facts and opinion, D.C., 336 F.Supp. 1036; 469 F.2d 752.

June 25, 1973. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition for writ of certiorari granted, judgment vacated and case remanded to the Court of Appeals for further consideration in light of Miller v. California, —— U.S. ——, 93 S.Ct. 2607, 36 L.Ed.2d —— (1973); Paris Adult Theatre I v. Slaton, —— U.S. ——, 93 S.Ct. 2628, 36 L.Ed.2d —— (1973); Kaplan v. California, —— U.S. ——, 93 S.Ct. 2680, 36 L.Ed.2d —— (1973); U. S. v. 12 200-ft. Reels of Super 8mm Film, —— U.S. ——, 93 S.Ct. 2665, 36 L.Ed.2d —— (1973); U. S. v. Orito, —— U.S. ——, 93 S.Ct. 2674, 36 L.Ed.2d —— (1973); Heller v. N.Y., —— U.S. ——, 93 S.Ct. 2789, 36 L.Ed.2d —— (1973); Roaden v. Ky., —— U.S. ——, 93 S.Ct. 2796, 36 L.Ed.2d —— (1973); and Alexander v. Virginia, —— U.S. ——, 93 S.Ct. 2803, 36 L.Ed.2d —— (1973).

Mr. Justice DOUGLAS would grant certiorari and reverse judgment. See Miller v. California, *ante* (dissenting opinion of Justice Douglas).

Mr. Justice BRENNAN, joined by Mr. Justice STEWART and Mr. Justice MARSHALL, would grant certiorari, vacate judgment, and remand for further proceedings not inconsistent with his dissent in Paris Adult Theatre I v. Slaton, *ante*. See Miller v. California, *ante* (dissenting opinion of Justice Brennan.)

APPENDIX B

Court of Appeals Opinion
December 20, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. 431—September Term, 1973.

(On remand from the Supreme Court
Decided: December 20, 1973.)

Docket No. 72-1208

G.I. DISTRIBUTORS, INC., ALVIN DRUSS, IRVING HERMAN and DATA AFFILIATES, INC.,

Plaintiffs-Appellees,

—v—

PATRICK MURPHY, Individually and in his capacity as Police Commissioner of New York City,

Defendant,

FRANK S. HOGAN, Individually and in his capacity as District Attorney of New York County,

Defendant-Appellant.

Before:

LUMBARD, FRIENDLY and FEINBERG,

Circuit Judges.

Reconsideration on remand from the Supreme Court, 93 S.Ct. 3056 (1973), of *G.I. Distributors, Inc.* v. *Murphy*, 469 F.2d 752 (2d Cir. 1972), which held that the first amendment rights of plaintiff-appellee, G.I. Distributors,

Inc., were not infringed when the police, while acting pursuant to search warrants authorizing the seizure of six copies of 56 magazines, imposed a temporary restraint on 19,000 additional copies of the magazines which they discovered during their search, until an adversary hearing could be held the following day.

Affirmed.

HERALD PRICE FAHRINGER, Esq., Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller & James, of counsel, on the brief), *Attorneys for Appellees.*

FRANK S. HOGAN, District Attorney, New York County, *appellant pro se,* New York, New York (Michael R. Juviler and Hugh Anthony Levine, Assistant District Attorneys, of counsel, on the brief).

LUMBARD, *Circuit Judge:*

By an order dated June 25, 1973, the Supreme Court vacated the decision of this court in *G.I. Distributors* v. *Murphy,* 469 F.2d 752 (1972), and remanded the case to us for further consideration in light of its decisions in *Miller* v. *California,* 93 S.Ct. 2601 (1973), *Paris Adult Theatre I* v. *Slaton,* 93 S.Ct. 2628 (1973), *Kaplan* v. *California,* 93 S.Ct. 2680 (1973), *United States* v. *Twelve 200-Ft. Reels of Super 8 mm. Film,* 93 S.Ct. 2665 (1973), *United States* v. *Orito,* 93 S.Ct. 2674 (1973), *Heller* v. *New York,* 93 S.Ct. 2789 (1973), *Roaden* v. *Kentucky,* 93 S.Ct. 2796 (1973), and *Alexander* v. *Virginia,* 93 S.Ct. 2803 (1973). Having given careful consideration to these decisions, we conclude that they do not require us to alter our prior opinion.

Court of Appeals Opinion December 20, 1973

In our earlier opinion, we held that *G.I. Distributors'* first amendment rights had not been violated when the police temporarily sequestered overnight 19,000 of the company's magazines until an adversary hearing could be held and a warrant obtained the following morning. We emphasized the unique facts of the case. Armed with search warrants authorizing seizure of six copies of 56 magazines[1] which allegedly were obscene, the police went to the warehouse of G.I. Distributors on January 6, 1972 and discovered the additional 19,000 copies of the publications sometime after 6 P.M. in the course of their search of the warehouse. Aware that these magazines might be destroyed or moved to a hiding place, they segregated the copies and stationed a guard on the premises overnight. As soon as possible the following morning, a full adversary hearing was held before Judge Moldow of the New York City Criminal Court. After examining samples of the magazines, he found probable cause to believe they were obscene and issued a search warrant authorizing the seizure of the 19,000 copies, which were then removed from the warehouse.[2]

In arguing that the minimal prior restraint exercised by the police in this case was unconstitutional, G.I. Distribu-

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1 The police actually found only 55 of the magazines at the warehouse. *G.I. Distributors* v. *Murphy*, 469 F.2d at 753 n.2.

2 As to the 19,000 magazines, we have recently been advised by the parties that they were shipped back to the suppliers of G.I. Distributors after the district court held the police actions unconstitutional and ordered the magazines returned to G.I. Distributors. 336 F.Supp. 1036 (S.D.N.Y. 1972).

G.I. Distributors apparently offered no objection in the district court to the retention by the police or the District Attorney of the 330 magazines initially seized pursuant to search warrants. The 330 copies were to be used as evidence in a still pending New York state criminal prosecution of G.I. Distributors and two of its officers, Alvin Druss and Irving Herman. On May 4, 1973, however, Justice Harold Birns of the New York Supreme Court ordered this evidence suppressed. The government has not appealed from this order, apparently intending to rely on other evidence.

tors relies principally on the Supreme Court's decisions in *Heller* v. *New York* and *Roaden* v. *Kentucky, supra.* We believe, however, that neither of these cases supports G.I. Distributors' contention. In *Heller,* the Court actually affirmed a decision of the New York Court of Appeals[3] which failed to find an infringement of first amendment rights, although an allegedly obscene film had been seized without a prior adversary hearing. Echoing the words of the Court of Appeals, the Supreme Court in *Heller* concluded that there is no absolute constitutional requirement of an adversary hearing prior to a seizure of a movie; a prompt judicial determination following the seizure will often be an adequate guarantee of first amendment rights.

The procedure followed by the police in the present case was in no way at odds with this holding. Within hours after the police came across the 19,000 magazines and set them aside, an adversary hearing was held at which Judge Moldow found probable cause to believe the publications were obscene. Nevertheless, G.I. Distributors argues that much of the language in *Heller,* if not its holding, requires us to reverse our earlier decision. In particular, it is urged that the Supreme Court condemned all pre-hearing seizures, except those in which a limited number of copies of the allegedly obscene materials are seized solely for evidentiary purposes. In our view, there is no basis for such a broad reading of *Heller.* Moreover, the pre-hearing sequestration which occurred here was such a temporary restraint that no real injury was done first amendment rights. At worst, G.I. Distributors was prevented from distributing its publications for a few hours on the morning of January 7, although even this is by no means certain since the record reveals no attempt at distribution by the company.

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3 29 N.Y. 2d 319 (1971).

There is little similarity here with the massive pre-hearing seizures for the purpose of the permanent destruction of books which occurred in *Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964) and *Marcus* v. *Search Warrants of Property*, 367 U.S. 717 (1961). As we noted in our earlier decision:

> Marcus involved an attempt to suppress allegedly obscene books by means of a vague search warrant which in effect allowed the police to seize anything that they deemed to be obscene. *A Quantity of Books* concerned the seizure of a large number of books under a statute which did not permit a hearing on the books' obscenity until at least 10 days after the seizure and did not require the judge to make a speedy decision after the hearing. Unlike these cases, no extended interruption in the public's access to the magazines nor long term suppression of possibly nonobscene literature was threatened here. 469 F.2d at 756.

But perhaps the most telling reason for not requiring a pre-seizure adversary hearing in cases such as the present one is the danger that, having been forewarned about the evidence the government is seeking, putative defendants may attempt to destroy, conceal, or otherwise dispose of this incriminating material. Indeed, as the *Heller* Court stated, in terms likewise applicable to the magazines at issue here:

> Counsel for New York has argued that movie films tend to "disappear" if adversary hearings are afforded prior to seizure. We take judicial notice that such films may be compact, readily transported for exhibition in other jurisdiction, easily destructible, and particularly susceptible to alteration by cutting and splicing crucial parts of film. 93 S.Ct. 2789, 2795 (1973).

G.I. Distributors also argues that *Roaden* v. *Kentucky*, *supra*, necessitates a reversal of our earlier decision. We disagree. *Roaden* involved a warrantless seizure of a film incident to the arrest of the manager of the drive-in theatre at which the film was being exhibited. Holding that the seizure was unconstitutional, the Supreme Court emphasized that there had been no prior probable cause determination by a judicial officer on the question of the obscenity of the movie. On the basis of this holding, it is urged here that the warrantless seizure of the 19,000 magazines by the New York City police was likewise unconstitutional. But in arguing that the language used in *Roaden* should be applied broadly to the present case, G.I. Distributors overlooks the Supreme Court's admonition in *Roaden* that each case must be determined on the basis of its particular facts. The fourth amendment is not to be read "in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." 93 S.Ct. 2796, 2800 (1973).

The circumstances under which the magazines were seized in the present case differ markedly from those under which the seizure of film took place in *Roaden*. In the latter case the film seized was being shown at a commercial theatre during regularly scheduled performances to the general public. Without difficulty, the sheriff could have first obtained a warrant and then seized the movie. In contrast, the police here stumbled upon additional copies of obscene magazines in a warehouse at night and sought merely to preserve them until an adversary hearing could be held and a search warrant obtained the following morning, by which time the contraband might otherwise have been destroyed, concealed, or transferred out of the jurisdiction. Whatever the police action in this case be called, it was the most limited form of detention consistent with

preventing removal of the magazines prior to getting a warrant the next morning. The police did not destroy the material, transport it, or apparently even interfere with the owners' access to it. They merely prevented the owners from moving the magazines for the period between the search and the adversary hearing the next morning. The courts have often advised police that when they have no warrant for a search or seizure, the proper course is to watch the item under suspicion in order to prevent it from being moved, during which time the search warrant can be obtained. *Cf. Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971); *United States* v. *Marshall*, 14 Cr. L. Rep. 2030, 2032 (9th Cir. Sept. 7, 1973). Essentially, that is what happened here. The police kept watch over the material pending the issuance of a warrant. Perhaps they could have gotten a warrant that night. Instead, they chose to get the warrant after the adversary hearing—certainly a reasonable course to follow, since having a hearing before confiscating all the magazines would actually benefit the owners. The procedure followed here, in short, may be termed a "seizure," but if it is, it is the most limited form of seizure imaginable, and therefore should not be classified as one with warrantless seizures that "become in themselves a form of censorship." *Heller* v. *New York*, 93 S.Ct. 2787, 2793 (1973).

Moreover, the police had ample grounds for assuming that the 19,000 publications were, indeed, contraband. In contrast to *Roaden*, in which "the seizure proceeded solely on a police officer's conclusions that the film was obscene," in the present case all 19,000 magazines sequestered temporarily overnight were copies of publications which two judges had already found probable cause to believe were obscene and for which warrants had been issued.[4] Acting

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4 A search warrant for 24 of the magazines had been issued by Judge Tyler of the New York Criminal Court. A search warrant for the other

entirely on the basis of this judicial determination of obscenity, the police did not go any further than was absolutely necessary under the circumstances in sequestering these copies overnight until a supplemental warrant could be obtained the following day permitting their removal from the warehouse.

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I dissent for two reasons from the reversal of Judge Weinfeld's order and from the adherence to our prior opinion.

The first ground is set forth in my original dissent, *G.I. Distributors, Inc.* v. *Murphy*, 469 F.2d 752, 758-60 (2d Cir. 1972). There, I distinguished between seizing *all* copies of an allegedly obscene book or magazine, such as occurred here in the overnight "sequestration," and seizing only a few copies for evidentiary purposes; I expressed the view that in the former situation, a prior adversary hearing must be held. The reasons for that view are fully explained in my prior dissent, which I incorporate here. Since then, the Supreme Court's decisions in *Heller* v. *New York*, 93 S. Ct. 2789, 2794 (1973), and *Roaden* v. *Kentucky*, 93 S. Ct. 2796, 2800 (1973), by citing with approval *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), upon which I mainly relied, further reinforce my conclusion that appellees' conduct in this case infringed the first and fourteenth amendments.

The second ground for my dissent rests on the fourth amendment and derives from the *Roaden* decision, *supra*,

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32 magazines had been issued by Judge McQuillian, another Criminal Court judge. Although approximately a year and a half later Justice Birns of the New York Supreme Court determined that these search warrants were constitutionally invalid, see fn. 2 *supra*, at the time of the seizure the police had no reason to doubt their validity.

93 S. Ct. at 2801, which emphasizes the illegality of seizing "all the books in a bookstore" without "a constitutionally sufficient warrant . . . ." The majority concedes, as it must, that the "quarantine" of the 19,000 magazines prior to the issuance of a warrant after an adversary hearing "may be termed a 'seizure,' . . . ." My brothers, however, attempt to distinguish this case from *Roaden*—in part, because of the "ample grounds for assuming that the . . . publications were, indeed, contraband" since warrants had already issued for a limited number of copies. But probable cause is not the only prerequisite to a valid fourth amendment seizure. Additionally,

> the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. [Footnote omitted.]

Stanford v. *Texas*, 379 U.S. 476, 485 (1965). The original warrants authorizing the taking of six copies of 56 magazines did not call for seizing *all* copies of the offending publications. To the extent that the seizure exceeded the specimens allowed by the warrants, it had *no* warrant authorization at all.[1] In calling for "a constitutionally sufficient warrant," *Roaden* nowhere implied that courts were henceforth to distinguish between greater and lesser degrees of inadequacy based on a sliding scale of "cause." On the contrary, the Supreme Court held that warrantless seizures—such as occurred in the present case—were simply unconstitutional.

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1 Indeed, the anomaly is that at the very time that the majority breathes life into the massive seizures here, by again overruling Judge Weinfeld's order, a state judge has already held illegal even the original seizures of sample copies of the magazines. See note 2 of the majority opinion.

The majority also differentiates this set of facts from *Roaden* on the ground that there was no time to seek a warrant since the magazines might meanwhile "have been destroyed, concealed, or transferred out of the jurisdiction." (This observation, of course, does not apply to the six sample copies of each magazine, which the police could, and did, take under the orignal warrants for evidentiary purposes.) *Roaden* did suggest in dictum that exigent conditions might permit an occasional warrantless seizure. 93 S. Ct. at 2802. The Court, however, specifically stated that:

> The facts surrounding the "massive seizures" of books in *Marcus* and *Quantity of Books* . . . presented no such "now or never" circumstances.

Id. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), dealt with the seizure of thousands of magazines from a warehouse—just the kind of situation involved in the sequestration here. It is therefore clear that the "urgency" claimed on these facts cannot, any more than the existence of "cause," justify the warrantless seizure of the 19,000 publications, particularly since "prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness." *Roaden, supra*, 93 S. Ct. at 2801.

Accordingly, I would withdraw our prior opinion and affirm the order of the district court.

APPENDIX C

Court of Appeals Opinion
November 14, 1972

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 3—September Term, 1972.

(Argued September 11, 1972 Decided November 14, 1972.)

Docket No. 72-1208.

G. I. DISTRIBUTORS, INC., ALVIN DRUSS, IRVING HERMAN and DATA AFFILIATES, INC.,
Plaintiffs-Appellees,

v.

PATRICK MURPHY, Individually and in his capacity as Police Commissioner of New York City,
Defendant,

FRANK S. HOGAN, Individually and in his capacity as District Attorney of New York County,
Defendant-Appellant.

Before: Friendly, Chief Judge,
Lumbard and Feinberg, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Edward Weinfeld, J., wherein appellant was required to return to the appellees 19,000 magazines which were held to be seized in violation of the first amendment.

Reversed.

Court of Appeals Opinion November 14, 1972

Hugh Anthony Levine, Assistant District Attorney, New York County (Frank S. Hogan, District Attorney, and Michael R. Juviler, Assistant District Attorney, on the brief), for appellant.

Herald Price Fahringer, Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller and James, on the brief), for appellees.

LUMBARD, Circuit Judge:

The District Attorney of New York County[1] appeals from part of an order of the Southern District of New York which requires him to return to the appellees 19,000 magazines which had been seized less than 18 hours prior to an adversary hearing on their obscenity. At the hearing which was held the following morning Judge Moldow of the New York City Criminal Court authorized the seizure. Judge Weinfeld found that the procedures followed by the police in confiscating these magazines prior to the hearing violated the first amendment as applied to the state by the fourteenth amendment. We reverse for the reasons given below.

On Thursday, January 6, 1972 the New York City police, acting pursuant to a search warrant and under the supervision of the District Attorney of New York County, entered the Long Island City warehouse of appellee G.I. Distributors, a wholesale distributor of books and periodicals, and seized six copies each of 55 allegedly obscene mazazines.[2]

[1] Defendant Patrick Murphy, sued individually and in his capacity as Police Commissioner of New York City, does not appeal from the lower court order.

[2] On January 5, 1972, the New York City Police Department obtained a search warrant from Judge Tyler of the New York Criminal Court authorizing the seizure of copies of 24 specified magazines and

(Footnote continued on following page)

While conducting the search the police discovered 19,000 additional copies of the publications they were seeking. An adversary hearing on the magazines' obscenity was scheduled for the following morning and G.I. and its attorney were notified. To prevent possible removal of the magazines before the hearing, the police packed the periodicals in 221 cartons and stationed a police officer on G.I.'s premises overnight.[3]

The hearing was held the next morning before Judge Moldow, who examined samples of the 55 magazines and found probable cause to believe that they were obscene. He issued a search warrant authorizing the seizure of the

(Footnote continued from preceding page)
all the books and records of G. I. Distributors. The warrant for some reason contains no finding that the magazines are obscene; but the police affidavit on which the warrant was based does contain such a claim. While executing the warrant the next day the police found 32 other publications which they felt were obscene. Judge McQuillan, another Criminal Court judge, came to G. I.'s premises on the evening of January 6th to view these magazines. He found them to be obscene and issued a search warrant authorizing the seizure of six copies of each. One of the 56 periodicals which the police were authorized to seize could not be found.

On this appeal we do not reach the question of whether the search warrants were valid under the fourth amendment. Nor is there any occasion for us to pass upon whether the magazines were in fact obscene—a question which was not raised either here or in the district court. The appellees' brief states that at the hearing before Judge Moldow counsel for appellees argued that the magazines were not obscene.

[3] When they left, however, the police also took all of the books and records of G. I. Distributors including those that dealt with publications not at issue in the current case. The following day, January 7, 1972, the police returned with a warrant to search the premises of appellee Data Affiliates, Inc., a New York corporation in the business of supplying computer services to several companies. Data Affiliates leases office space from G. I. Distributors and provides some computer services to it but these are its only connection with G. I. The police seized all of their business records and computer tapes.

19,000 copies[4] and they were removed from G.I.'s Long Island City warehouse the same day.[5]

Three days later, on January 10, 1972, appellees brought suit under 18 U.S.C. § 1983 in the Southern District seeking return of the 19,000 magazines and other relief.[6] Relying on the Supreme Court's decision in *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), and our decisions in *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970) and *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), Judge Weinfeld held that the first

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[4] The New York Criminal Procedure Law authorizes a Criminal Court judge to issue a search warrant and, when necessary, to conduct a hearing to "examine, under oath, any person [who] . . . may possess pertinent information." See Criminal Procedure Law §§ 690.05(1), 690.40(1). Nevertheless, appellees assert that several recent New York decisions have held that Criminal Court has no jurisdiction to conduct an adversary hearing on the question of obscenity prior to issuing a search warrant, because New York already has a civil procedure for suppressing obscene material, see C. P. L. R. § 6330, and because there may be constitutional objections to the search warrant procedure. The New York Supreme Court decisions are in conflict on this matter, *compare People* v. *O'Brien*, 66 Misc. 2d 254, 320 N.Y.S. 2d 425 (Sup. Ct. 1971); *Milonas* v. *Schwalb*, 65 Misc. 2d 1042, 319 N.Y.S. 2d 327 (Sup. Ct. 1917) *with Bethview Amusement Corp.* v. *Judges of Nassau Co.*, D. Ct., ____ Misc. ____, 322 N.Y.S. 2d 42 (Sup. Ct. 1971) *(and) People* v. *Schiffien*, 64 Misc. 2d 311, 314 N.Y.S. 2d 745 (Sup. Ct. 1970), and, absent any definitive word from the state appellate courts, we feel constrained to follow the clear grant of jurisdiction which is contained in the Criminal Procedure Law. Moreover, if appellees, plaintiffs below, wished to challenge the jurisdiction of the Criminal Court in this matter under New York law, they should have raised that issue in the New York courts, not here.

[5] The facts in this paragraph are asserted in the appellant's brief and were stated at argument. They were in part conceded in the argument of appellees' counsel and in part not denied. The record contains no information regarding the hearing before Judge Moldow.

[6] They also sought return of all the business books and records that had been taken from the two corporate appellees.

amendment, as applied to the states by the fourth amendment, requires an adversary hearing before the seizure of allegedly obscene material. He found that the overnight quarantine of 19,000 magazines was an invalid prior restraint; he ordered the magazines returned to appellees and granted the other relief prayed for in the complaint.[7]

An application for a stay of Judge Weinfeld's order was denied by this court on January 26, 1972, and by Mr. Justice Blackmun on January 28, 1972.

Appellant challenges on this appeal only that part of Judge Weinfeld's order requiring him to return the 19,000 magazines. The District Court [*sic*] claims that the procedures followed by the police in sequestering the 19,000 periodicals overnight did not violate the first amendment.[8] We agree.

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[7] Noting that the other property which had been seized was part of a single successful attempt to shut down all of G. I.'s operations without a prior hearing on whether G. I. was purveying obscenity when less than 10% of publications distributed by G. I. were involved in the pending prosecution, Judge Weinfeld decreed that all of the property taken from appellees except the 330 magazines which had been seized initially be returned on the condition that appellees not dispose "of any of the business books, records and other material directed to be returned, so that they will be available for subpoena in the State prosecution."

A further question is whether the magazines returned to the appellee pursuant to the district court's order have now been distributed to retailers, thus rendering the appeal moot. We were assured on oral argument, however, that a substantial number of the magazines in question are still in appellee's possession and thus there is a live issue whether appellant can retake them pursuant to the state judge's order.

[8] The appellant claims for the first time on this appeal that plaintiffs' complaint in the district court also failed to state a claim for federal injunctive relief because there was no showing that irreparable injury resulted from the overnight quarantine of the magazines. See *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959); *Capital City Gas*

(Footnote continued on following page)

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The discovery of a large cache of magazines thought by the police to be obscene necessitated immediate action on their part to seize it as contraband[9] and to secure it as evidence in a criminal prosecution for wholesale distribution of pornography, a felony under New York law.[10] The police had good reason to believe that the magazines were obscene, since all of the periodicals specified in the warrant had previously been scrutinized by a judicial officer

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Co. v. *Phillips Petroleum*, 373 F.2d 128 (2d Cir. 1967). Although we need not consider this issue, we note that appellant has misconstrued the nature of the irreparable injury requirement in first amendment cases. Assuming for the moment that appellees were correct in their assertion that the overnight quarantine before an adversary hearing could be conducted was violative of the first amendment, then "the procedure leading to the seizure order was constitutionally deficient." *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 210-11 (1964); *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410, 412 (2d Cir. 1969). "A violation of the Fourteenth Amendment infected the proceedings" and not only the original overnight quarantine of the magazines but their subsequent retention by the police was invalid. *See Marcus* v. *Search Warrants*, 367 U.S. 717, 738 (1961). Thus, in determining the seriousness of the threatened injury we look not only to the overnight seizure but also to the entire time in which the material would be kept in police hands and away from the public. It makes no difference that the magazines were later found to be obscene in an adversary hearing. See *A Quantity of Books* v. *Kansas*, *supra* at 212-13. If they were seized initially in violation of the procedures mandated by the first amendment, irreparable injury was threatened, and it is now settled law that federal injunctive relief will issue to insure their return. *E.g.*, *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (1970), *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969); *Potwora* v. *Dillon*, 386 F.2d 74 (1967). See also *G. I. Distributors, Inc.* v. *Murphy*, 336 F.Supp. 1036, 1038-39 (1971).

[9] The New York Criminal Procedure Law authorizes the issuance of a search warrant to seize contraband (*i.e.*, property unlawfully possessed). See New York Criminal Procedure Law § 690.10(2).

[10] New York Penal Law § 235.06 (McKinney Supp. 1972). On the evening of January 6, 1972 Alvin Druss and Irving Herman, president and secretary-treasurer respectively of G. I. Distributors, had been arrested for felonious wholesale promotion of obscenity.

who had found them to be so. They immediately recognized that an adversary hearing was required before the magazines could be removed and kept until the trial of the criminal charges.[11] The District Attorney scheduled a hearing at the earliest possible time—the following morning—and notified the parties. Understandably anxious that the magazines not disappear during the short delay before the hearing, the police took the precaution to segregate them from the other publications in G.I.'s warehouse and stationed a man there for the night to see that they were not removed. This was a minimal interference with the normal distribution of the magazines because the quarantine occurred only from sometime after 6 P. M., January 6,[12] until Judge Moldow's issuance of the search warrant after a hearing the next morning. As there is nothing in the record to show that G.I. had any plans to distribute any of the magazines after usual business hours on January 6, the interference with possible distribution to retailers could not have amounted to more than a few hours on the morning of January 7th.

The police procedure used here was designed to restrain distribution of the magazines for the minimum time possible until an adversary hearing could be held before a

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[11] In *United States* v. *Wild*, 422 F.2d 34 (2d Cir. 1969) we held that a small number of copies of allegedly obscene magazines could be seized by the police on the strength of a search warrant issued *ex parte* and without a prior adversary hearing, because the danger of suppressing protected expression was minimal. However, in *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964) the Supreme Court held that when a large number of books are to be seized and kept for a substantial time by the police, a prior adversary hearing must be held.

[12] Although the record is silent as to when the police first sequestered the magazines, presumably it was some time after Judge McQuillan signed the search warrant at 6 P.M. on January 6, 1972.

judicial officer. That hearing was held promptly the next morning, and a decision was rendered immediately thereafter. Thus, the procedure did not present the interference condemned in *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961) and *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964). *Marcus* involved an attempt to suppress allegedly obscene books by means of a vague search warrant which in effect allowed the police to seize anything that they deemed to be obscene. *A Quantity of Books* concerned the seizure of a large number of books under a statute which did not permit a hearing on the books' obscenity until at least 10 days after the seizure and did not require the judge to make a speedy decision after the hearing. Unlike these cases, no extended interruption in the public's access to the magazines nor long term suppression of possibly non-obscene literature was threatened here. Therefore, we hold that the procedures used by the police in this case did not offend the first amendment.

We find support for our conclusion in several recent Supreme Court decisions. While it has been clear for some time that all prior restraints were not invalid, see *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43 (1961), it was not until 1965 that the Supreme Court in striking down Maryland's motion picture censorship statute indicated some of the essential elements of an acceptable licensing scheme. *Freedman* v. *Maryland*, 380 U.S. 51 (1965). The Court stated that any restraint imposed in advance of an adversary hearing on the obscenity question must be "for the shortest period compatible with sound judicial resolution . . . [and] the procedure must also assure a prompt final judicial decision." *Freedman* v. *Maryland*, *supra* at 59. *See* also *Teitel Film Corp.* v. *Cusach*, 390 U.S. 139 (1968); *Blount* v. *Rizzi*, 400 U.S. 410 (1971).

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Last term the Supreme Court spelled out for the first time a set of specific requirements which would meet, in at least one factual context, the standards laid down in *Freedman*. In *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), the Supreme Court upheld 18 U.S.C. § 1305(a) which prohibits the importation of obscene materials into the United States and authorizes the seizure of such materials by customs officials pending a hearing by the district court on their obscenity. As enacted by Congress, § 1305(a) contained no time limits within which judicial action had to be commenced. To bring the statute into harmony with the first amendment, the Supreme Court read into § 1305(a) the requirement that judicial "proceedings be commenced within 14 days and completed within 60 days of their commencement." *United States* v. *Thirty-Seven Photographs*, *supra* at 373.

Justice White, writing for the majority, stated that, "of course, we do not now decide that these are the only constitutionally permissible time limits. We note, furthermore, that constitutionally permissible limits may vary in different contexts." *United States* v. *Thirty-Seven Photographs*, *supra* at 374. Each pre-hearing seizure must be evaluated in light of its particular circumstances and the nature and duration of the restraint imposed. The procedures followed in this case resulted in the least prior restraint possible in the situation.[13]

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[13] Appellees contend that *Thirty-Seven Photographs* is inapplicable to the present case because it dealt with the regulation of products coming into this country. In fact, the government's brief in *Thirty-Seven Photographs* argued that the government had complete discretion in excluding items coming into the country. The Supreme Court implicitly rejected this contention by choosing to treat the case as one to be tested by settled first amendment precedents alone.

Nothing in our decisions in *Astro Cinema Corp.* v. *Mackell,* 422 F.2d 293 (2d Cir. 1970) or *Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (2d Cir. 1969) is inconsistent with the result we reach here. Both *Astro* and *Bethview* concerned the seizure of a motion picture film during a regular theatre performance as evidence in a later prosecution for the crime of obscenity. The films were not seized by the police as a temporary measure until a full adversary hearing could be had; instead they were to be retained as evidence until the trial of the underlying criminal charges. Thus, the defendants had no way of securing a prompt judicial determination of the question of the obscenity except by bringing suit themselves. In such circumstances we concluded that "if the State wants to interfere *substantially* with the distribution of films or books, it must first provide . . . an adversary hearing." *Astro Cinema, supra* at 296 (emphasis added). However, when we were presented with a minor and insubstantial prior restraint involving the seizure of a few samples of allegedly obscene materials for evidentiary purposes, we did not hesitate to permit the seizure without a prior hearing. See *United States* v. *Wild,* 422 F.2d 34 (2d Cir. 1969), *reh. denied* (2d Cir. Feb. 2, 1970), *cert. denied,* 402 U.S. 986 (1971).

Were we to hold that no prior restraint whatever is permissible, even the few hours in this case, the police would find it virtually impossible to cope with the increasing flow of obscene magazines to the hundreds of outlets in our metropolitan centers. Arrests and the filing of criminal charges will not stop that flow; they provide only a brief interruption after which business continues as usual. The District Attorney argues that in order to keep illegal publications out of circulation it is necessary to seize and

confiscate them. The police seek to utilize New York's search warrant procedure to halt the flow of printed obscenity on the grounds that such materials are both contraband (*i.e.*, unlawfully possessed) and the means for committing the crime of wholesale promotion of obscenity in violation of Section 235.06 of the New York Penal Law. Unless the police are permitted to station an officer where contraband is found for such time as may be necessary to hold an adversary hearing regarding the propriety of the issuance of a search warrant, any seizure of such contraband will in all likelihood be frustrated. With no police observer on the scene, the distributors would be free to remove the material and distribute it from another location unknown to the police; thus, there would be nothing left to seize after the warrant has issued. We think that such considerations far outweigh the very slight interference with possible distribution which was here visited upon the appellees.

Our decision in this case is a limited one. Because of the incomplete record on appeal, we have no basis on which to question adequacy of the hearing. We decide only that the brief and insubstantial prior restraint which occurred here, followed a few hours later by a hearing, notice of which has been given to those in possession of the alleged obscene publications, does not violate the first amendment.

Court of Appeals Opinion November 14, 1972

FEINBERG, Circuit Judge (dissenting):

I dissent.

This seems to me an important and exceedingly close case. Important because it is apparently the first time this court has interpreted recent Supreme Court decisions as allowing seizure of all copies of an allegedly obscene book or magazine before an adversary hearing to determine obscenity. In *Overstock Book Co.* v. *Barry*, 436 F.2d 1289, 1296 (1970), we ruled precisely to the contrary. The case is close because there are persuasive practical arguments for deciding either way and the teaching of the precedents is not clear. But on balance I would affirm Judge Weinfeld's order.

As a matter of common sense, there is a good deal of merit in the majority's position that the prior restraint here was so "brief and insubstantial" that it did not "violate the first amendment." Yet, practicality alone also commends the holding of the district court that in this case there must be "an adversary hearing to determine obscenity prior to restraint or seizure, not a post-seizure hearing." This furnishes a clear, easily applied test of constitutional validity whereas the majority's position will necessarily involve the courts in intractable problems of drawing lines in cases involving attempts to suppress books and magazines.

Similarly, the prior cases leave one in doubt as to the required course here. The majority relies heavily on the standards for administrative film licensing first enunciated in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and later

applied primarily in film censorship cases. *E.g., Teitel Film Corp.* v. *Cusack,* 390 U.S. 139 (1968) (per curiam).[1] These criteria allowed a brief restraint prior to a final judicial determination, but this was explained by the Court as stemming from the unique nature of movie exhibitions—involving advanced scheduling of film runs at specific theatres—and the application of the *Freedman* rules was explicitly limited to films. 380 U.S. at 60-61. See also *Times Film Corp.* v. *Chicago,* 365 U.S. (1964). Recently, however, the Court has applied the *Freedman* standards in two obscenity cases not involving films, *Blount* v. *Rizzi,* 400 U.S. 410 (1970); *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971), and the majority cites these decisions to support its rejection of the pre-seizure hearing requirement. On the other hand, the Supreme Court held in *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964)—a decision explicitly overruled—that the failure of the state to provide an adversary judicial hearing on the issue of obscenity prior to the seizure by police of all copies of a number of books in the hands of a distributor rendered the procedure "constitutionally deficient." *Id.* at 211. In that case, the statute authorized such seizures with a subsequent hearing to determine whether the seized material was obscene and could be destroyed. The seizures were made pursuant to a very specific warrant issued after a judge had inspected copies of some of the publications proposed to be confiscated, see *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961), and the hearing was held ten days

[1] The Court in *Freedman* held that to survive judicial scrutiny, any system of film licensing must provide for a prompt decision and speedy judicial review in case the license is denied, must require the licensing agency itself to seek the review and must place the burden of proof of obscenity on the censor. 380 U.S. at 58-59.

later. Nevertheless, the Court invalidated the procedure because "the warrant . . . authorized the sheriff to seize all copies of the specified titles, and . . . P-K was not afforded a hearing on the question of . . . obscenity . . . before the warrant issued . . . ." 378 U.S. at 210.

The silent premise of the majority opinion is that *Blount* v. *Rizzi, supra,* and *United States v. Thirty-Seven Photographs, supra,* make *A Quantity of Books* no longer applicable. I do not believe that these two decisions—which involved federal statutory schemes for administrative review of allegedly obscene materials sold or advertised through the mails[2] or passing through United States Customs respectively—were intended to overrule *A Quantity of Books.* In neither case is there any intimation that *Freedman* is being extended to contexts other than the type of administrative review statutes in question.[3] Indeed, not one of the several opinions in either case even mentions *A Quantity of Books* or the problem of police seizures involved there—and here. This conclusion as to the limited scope of these recent decisions is further reinforced by the fact that the author of the Court's opinion in *A Quantity of Books* wrote the majority opinion in *Blount,* concurred in *Thirty-Seven Photographs,* and yet reiterated, less than three months

[2] The provisions in question, now 39 U.S.C. §§ 3006-07, authorize the Post Office to return all mail and payments addressed to an individual who is found to be selling obscene materials or sending advertising for it through the mails.

[3] The plurality opinion in *Thirty-Seven Photographs* rested heavily on the unique and historic power of United States Customs officers:

> Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country.

402 U.S. at 376. See also d. at 378 (Stewart, J., concurring).

before the latter decision, the continuing validity of the rule of *A Quantity of Books*. See *Dyson v. Stein*, 401 U.S. 200, 204 (1971) (Brennan, J., concurring).

Therefore, we are left with uncertain guidance in applying precedents to a new fact pattern, not an unusual situation for a court to be in. I will not pretend to be outraged by the restraint in this case of only "a few hours," after which the magazines were found to be obscene. But I do think that the procedure approved here poses dangers to the preferred interests protected by the first amendment. The majority allows the seizure prior to an adversary judicial hearing of *all* copies of an allegedly obscene magazine, completely preventing its distribution to the public. This is far different from the seizure of just a few copies for use as evidence, a procedure we have already approved. *Overstock Book Co.* v. *Barry, supra*. While the restraint prior to the hearing was brief here, it is likely, especially in the absence of specific statutory limitations, that a case-by-case approach will either tolerate the gradual relaxation of constitutional requirements or force this court to make repeated, arbitrary distinctions. How soon must the adversary hearing be held? The prior restraint here was only "a few hours on the morning of January 7th," according to the majority. Would prior restraint of a book or magazine for an entire day be too much? Or a few days? Or a few weeks? How soon must the adversary hearing be concluded? Is there any significant difference between magazines in a warehouse and a supply of books in a retailer's storage area? Although it is asserted that such a flexible approach is necessary to successful enforcement of anti-obscenity laws, we should remember that our primary concern is not with the danger that some obscene

publications might escape the prosecutor's net; it is, rather, with the protection of the public's right to read *nonobscene* books or magazines that some official may mistakenly regard as obscene. The furnishing of an effective "safeguard against the suppression of nonobscene books" is what the constitutional issue is all about. See *A Quantity of Books* v. *Kansas, supra,* 378 U.S. at 208. Drawing the hard-and-fast line of a prior adversary hearing before total seizure of books and magazines—as was done in *A Quantity of Books, supra*—has the virtue of accomplishing just that.[4]

Blount and *Thirty-Seven Photographs* may perhaps presage a dilution of the limitations previously imposed on police seizure of allegedly obscene books and magazines. But the Supreme Court has not extended *Freedman* that far, and I would rely on *A Quantity of Books* and on our own prior decision in *Overstock Book Co., supra,* 436 F.2d at 1296. See also *American News Co.* v. *Ladas,* 454 F.2d 1237 (6th Cir. 1972).

For these reasons, I would affirm Judge Weinfeld's order.

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[4] It is true that the Supreme Court in *United States* v. *Thirty-Seven Photographs, supra,* engaged in a form of line-drawing when it read into the law a set of time limits for the start and conclusion of hearings following the impounding of allegedly obscene material by United States Customs. 402 U.S. at 373-74. However, this was done to save an existing federal statute incorporating a long-recognized power of national sovereignty. It does not follow that this court should, in the absence of a carefully drawn state statute, invite future litigation on a case-by-case basis to explore further the possible extent of police power to seize and hold material that may ultimately be found to be protected expression.

APPENDIX D

District Court Opinion

By Edward Weinfeld, D. J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(Same Title.)

Herald Price Fahringer, Esq., One Niagara Square, Buffalo, New York, Attorney for Plaintiffs.

J. Lee Rankin, Esq., Corporation Counsel, Municipal Building, New York, New York, Attorney for Defendant Murphy.

Michael M. Klein, Esq., Assistant Corporation Counsel, of Counsel.

Frank S. Hogan, Esq., District Attorney, New York County, 155 Leonard Street, New York, New York, Defendant Pro Se.

Hugh Anthony Levine, Esq., Assistant District Attorney, of Counsel.

Plaintiffs, G. I. Distributors, Inc., a magazine and book distributor, and Data Affiliates, Inc., a computer service company, bring this action pursuant to 42 U.S.C., section 1983, and preliminarily move for the return of their respective properties seized by the defendants pursuant to warrants of seizure issued by judges of the Criminal Court of the City of New York. It was a massive seizure—the plaintiffs' premises were stripped clean. In the instance of the plaintiff distributor, initially six samples each of fifty-five alleged obscene magazines were seized; in addition, 19,000

copies of the fifty-five items were crated in 221 separate cartons, confiscated by the police and set aside in the warehouse under police guard; also seized were all its business records of every kind, nature and description. In the instance of the plaintiff Data Affiliates, Inc., which furnishes computer services to plaintiff distributor, as well as to eight other companies who have no connection with the plaintiff distributor, the seizure extended to electro-magnetic disc, tapes and other items used to prepare payroll billings and other services for the customers.

This application for the immediate return of the seized property brings into sharp focus the irreconcilable holdings between our Court of Appeals[1] and the New York State Court of Appeals[2] on applications for the return of alleged obscene or pornographic material seized under a warrant but without a prior adversary hearing. Our Court of Appeals holds that the First Amendment, as applied to the states by the Fourteenth Amendment, requires an adversary hearing before seizure. This court, of course, is bound to follow its ruling absent a doctrinal trend indicating a reversal of attitude with respect to its holding.[3] There is no such indication; to the contrary, recently it seemingly adhered to its position when it denied a stay of an order entered by Judge Pollack in reliance upon *Bethview* direct-

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[1] *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970); *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *See also Mod Amusement Co.* v. *Murphy*, 72 Civ. 1 (MP) (S.D.N.Y., filed Jan. 7, 1972); *P.A.J. Corp.* v. *Murphy*, 302 F. Supp. 704 (1970).

[2] *People* v. *Heller*, ____ N.Y.2d ____ (1971), 116 N.Y.L.J., no. 115, p. 1 (issue of Dec. 16, 1971).

[3] *Cf. United States* v. *Ullman*, 221 F.2d 760, 762 (2d Cir. 1955), *aff'd*, 350 U.S. 422 (1956).

ing the return of seized films where no prior adversary hearing had been conducted.[4]

Plaintiff distributor offers no objection to the retention by the defendants of six copies of each of the fifty-five alleged obscene items, a total of 330, as sample evidence for use by the State in connection with the pending charges relating to such materials. The defendants are directed to return the remaining seized alleged obscene material—the 19,000 magazines which, it is clear, were seized as part of the initial search. They were not immediately removed as a matter of convenience to the police, and a subsequent hearing before a judge of the Criminal Court of the City of New York was held only after the 19,000 magazines had already been seized. For the purpose of determining prior restraint, the plaintiff G. I. Distributors had already been effectively prevented from distributing its wares and the public from reading them.[5] Constitutional requirements mandate an adversary hearing to determine obscenity prior to restraint or seizure, not a post-seizure hearing.

There remains the question as to other materials seized, which clearly do not come within the category of alleged obscene matter. The seizure here was of lock, stock and barrel; it included, in addition to the alleged contraband material, all plaintiff's business records, from employee history cards to general ledgers, checkbooks, payroll records, order books and all items required in the conduct and performance of its business. The State contends that these

[4] *Mod Amusement Co.* v. *Murphy*, 72 Civ. 1 (MP) (S.D.N.Y., filed Jan. 7, 1972). The motion to stay the order was denied by the Court of Appeals on January 12.

[5] *Cf. A Quantity of Books* v. *Kansas*, 378 U.S. 205, 212-13 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

other records, including those of Data Affiliates, Inc., were seized and intended for use as evidence in the criminal prosecution, and it argues even if the seizure was constitutionally overbroad, the court should not order their return but remit plaintiffs to their remedy in the state courts. However, upon the facts of this case, it would fly in the face of reality to direct the return of the alleged contraband material under *Bethview* and treat the balance of the mass seizure separately. The seizure interrupted the normal functioning of each plaintiff's business and effectively curtailed all their operations. In the instance of G. I. Distributors, the seized material constituted only a minor part of the publications distributed—less than 10%—yet it was prevented from distributing all its publications. In the case of the computer service plaintiff, the only relationship of its records to the distribution of purported pornography was the payroll billings for G. I. Distributors' employees. In end result, the defendants' seizure of (1) the alleged contraband material and (2) the ordinary books, records and other business documents for the functioning of plaintiffs' respective businesses constituted an effective prior restraint because in combination they totally prevented the G. I. Distributors from distributing its magazines and reaching the public. It was as effectively prevented from distributing by having its records or orders for magazines seized, without which it was unable to make any distribution, as it was by the seizure of the magazines themselves. As Mr. Justice Brennan stated in his concurring opinion in *Dyson* v. *Stein*:[6]

> "If proved, [the alleged police conduct] would justify federal intervention. The mass seizure of some

[6] 401 U.S. 200, 204 (1971).

> two tons of the issues of the newspaper without a prior judicial determination of the alleged obscenity of the issues was unconstitutional. • • • Similarly, the mass seizure of the tools and equipment required to prepare the newspaper—insofar as it disabled appellee from publishing future issues—infringed the principle of Near v. Minnesota, 283 U.S. 697 (1931)."

Subsequent to *Bethview* and *Astro Cinema*, the Supreme Court decided a series of cases indicating that absent a showing of "bad faith, harassment, or any other unusual circumstances that would call for equitable relief," federal courts should not intervene in pending state criminal proceedings.[7] While it does not now appear that the defendants can be charged with bad faith or harassment, since they followed the procedure approved by the New York Court of Appeals, there are sufficient extraordinary circumstances with a showing of irreparable injury to warrant federal injunctive relief. Unlike a mere possibility of a "chilling effect" on the First Amendment freedoms,[8] here there was a complete and total restraint upon the operations of a magazine distributor, the overwhelming majority of whose distribution could not constitutionally be prevented even after an adversary hearing. Unlike the situation in *Perez* v. *Ledesma*,[9] there is no adequate remedy under New York law to obtain the prompt return of the material at issue.[10] The remedy exists in theory, but in practice has

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[7] *Younger* v. *Harris*, 301 U.S. 37, 54 (1971). *See also Byrne* v. *Karalexis*, 401 U.S. 216 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

[8] *Cf. Younger* v. *Harris*, 401 U.S. 37, 51 (1971).

[9] 401 U.S. 82 (1971).

[10] *See Potwora* v. *Dillon*, 386 F.2d 74 (2d Cir. 1967); *Gregory* v. *DiFlorio*, 298 F. Supp. 1360 (W.D.N.Y. 1969).

been cumbersome and inefficacious.[11] Moreover, in the light of New York's highest court's most recent ruling, it would appear futile to use it for the return of the alleged obscene material, since that court seemingly determined that a prior adversary hearing is not a prerequisite for such seizure.[12] Further, there is far less interference with the pending state proceeding than that involved in *Perez*, for here all of the materials returned to the plaintiffs would still be available for use in the criminal prosecution.[13] Plaintiffs do not seek an order suppressing the use of such evidence in the state prosecution.[14] Nor do they seek injunctive relief enjoining the state court prosecution or injunctive relief against future seizures. In any event, *Younger* v. *Harris* and related cases were before our Court of Appeals in the *Mod Amusement* case,[15] and, as already noted, the court refused to stay Judge Pollack's order returning the allegedly obscene films, an apparent indication that the clear holding in *Bethview* and *Astro Cinema* have not been compromised by the recent Supreme Court decisions.[16]

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[11] *Cf. Monroe* v. *Pape*, 365 U.S. 167, 174 (1961).

[12] *See People* v. *Heller*, ____ N.Y.2d ____ (1971), 116 N.Y.L.J., no. 115, p. 1 (issue of Dec. 16, 1971). This court uses the word "seemingly" because despite *Heller's* explicit holding and its extensive discussion of why an adversary hearing is unnecessary, the final paragraph attempted to distinguish a motion picture seizure from the massive seizure of publications.

[13] *See Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293, 296-97 (2d Cir. 1970).

[14] *Cf. Stefanelli* v. *Minard*, 342 U.S. 117 (1951).

[15] *Mod. Amusement Co.* v. *Murphy*, 72 Civ. 1 (MP) (S.D.N.Y., filed Jan. 7, 1972).

[16] But see *Rialto Theatre Co.* v. *Wilmington*, 440 F.2d 1326 (3d Cir. 1971) (per curiam); *Eve Productions, Inc.* v. *Shannon*, 439 F.2d 1073 (8th Cir. 1971) (per curiam).

Accordingly, defendants are directed to return the materials seized to the plaintiffs, without prejudice to the right of the defendants to subpoena the same for use as evidence in the pending criminal proceeding. The plaintiffs, as a condition of the granting of their application, are enjoined from disposing of any of the business books, records and other material directed to be returned, so that they will be available for subpoena in the State prosecution.[17]

This order is stayed until noon, January 20, 1972.

Dated: New York, N. Y.
January 19, 1972

EDWARD WEINFELD
United States District Judge

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[17] See *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293, 296-97 (2d Cir. 1970).

APPENDIX E

The following cases involved the seizure of First Amendment material without the benefit of a prior adversary hearing.

1. *State of Wisconsin ex rel. Nemec* v. *Steffes*, (Mil. Co. Cir. Ct., Doc. No. 380-118).

On June 17, 1970 authorities seized 500 paperback books, 2,000 magazines and 15 reels of film. Eighteen months later, on December 22, 1971, the materials were returned by the district attorney's office which retained only sufficient copies for prosecution.

2. *State of Wisconsin ex rel. Keeley* v. *Spracker*, (Mil. Co. Cir. Ct., Doc. No. 380-311).

On June 19, 1970 authorities seized 500 paperback books, 2,000 magazines and 15 reels of film. The materials were ordered to be returned, but were not released until December 22, 1971, eighteen months later. The district attorney's office retained sufficient copies for prosecution.

3. *Matter of Search Warrant for Best Buys Company* (LaCrosse Co. Ct., Wis., Doc. No. 4202-A).

On May 28, 1971 authorities seized 500 paperback books, 1,000 magazines and 100 reels of film. The materials were ordered returned and were finally released on January 31, 1972, seven months later. The district attorney's office was permitted to keep sufficient copies for prosecution.

4. *For Adults Only, Inc. v. State of Florida* (Cir. Ct., 11th Jud. Cir., Dade Co., Doc. No. 717412).

On May 12, 1971 authorities seized 192 paperback books, 900 magazines, 32 reels of film and 79 newspapers. These materials are still retained by the district attorney's office, while the case winds its way through the Florida appellate courts. A petition for certiorari has been filed in the Supreme Court of Florida and briefs have been submitted.

5. *People of the State of Illinois* v. *Larry Sparks* (Cir. Ct., 18th Jud. Cir., Doc. Nos. 72-M-1650 and 72-M-1651).

On June 6, 1972 authorities seized two reels of film without a warrant. The films are still retained by the authorities and a suppression motion is currently under advisement by the court.

6. *People of the State of California* v. *Frederick A. Loar and Kay Ann Loar* (Super. Ct., Orange Co., Cal., Case No. C-26732).

On May 24 and 25, 1971 authorities seized 22,500 reels of film and 30,000 photographs. Ultimately, the defendants were acquitted, but the films and photographs were never returned to them.

7. *State of Ohio* v. *Kassaim Migdadi* (Ct. of Com. Pleas, Franklin Co., Doc. Nos. 48322-48433, 29018-29019).

On November 10, 1969 authorities seized 4 magazines. Subsequently the defendant was acquitted of criminal charges and the magazines were returned to him on April 28, 1972, 17 months after their seizure.

8. *State of Ohio* v. *Robert L. Johnson* (Mun. Ct., Franklin Co., Doc. No. 10451).

On April 28, 1971 authorities seized 1,441 paperbacks and magazines. These materials have been in the possession of the authorities for 20 months.

9. *State of Ohio* v. *Robert L. Johnson* (Mun. Ct., Franklin Co., Doc. No. 10761).

On May 1, 1971 authorities seized 59 paperbacks and magazines. These materials have been in the possession of the authorities for 20 months.

10. *State of Ohio* v. *Robert L. Johnson* (Mun. Ct., Franklin Co., Doc. No. 12075).

On May 14, 1971 authorities seized 9 reels of film and 1 projector with cassette. These materials have been in the possession of the authorities for 20 months.

11. *State of Ohio* v. *Howard W. Bricker* (Mun. Ct., Franklin Co., Doc. No. 9789).

On April 20, 1971 authorities seized 36 paperback books and magazines. These materials have been in the possession of the authorities for 20 months.

12. *State of Ohio* v. *Howard W. Bricker* (Mun Ct., Franklin Co., Doc. No. 9898).

On April 21, 1971 authorities seized 32 paperback books and magazines which are still in custody.

13. *State of Ohio* v. *Howard W. Bricker* (Mun. Ct., Franklin Co., Doc. No. 12216).

On May 15, 1971 authorities seized 23 paperback books and magazines which are still in their custody.

14. *State of Ohio* v. *Arties* (Mun. Ct., Franklin Co., Doc. No. 24847).

On September 8, 1970 authorities seized 7 mechanical items and other related items which are still in their custody.

15. *State of Ohio* v. *Frank J. Capadonary*. (Mun. Ct., Franklin Co., Case No. 9672).

Ten paperback books and magazines were seized on April 19, 1971 and are still in their custody.

16. *State of Ohio* v. *Jacobs* (Mun. Ct., Franklin Co., Doc. No. 24849).

On September 8, 1970 authorities seized 8 movies and mechanical and other related items. These materials are still in their custody.

17. *State of Ohio* v. *Migdadi* (Mun. Ct., Franklin Co., Doc. No. 8125).

On April 3, 1971 authorities seized 22 paperback books and magazines which are still in their custody.

18. *State of Ohio* v. *Richard A. Blair* (Mun. Ct., Franklin Co., Doc. No. 9435).

On April 21, 1970 seven magazines were seized from the defendant. At the preliminary hearing, the court found no probable cause for the seizure, but the magazines were never returned.

19. *State of Ohio* v. *Richard A. Blair* (Mun. Ct., Franklin Co., Doc. Nos. 9380-9391).

On April 20, 1970 authorities seized 4 magazines. The criminal charges were dismissed, but the magazines were never returned.

20. *State of Ohio* v. *Richard A. Blair* (Mun. Ct., Franklin Co., Doc. No. 9467).

Two magazines were seized from the defendant on April 21, 1970 and, although the charges were dismissed, the magazines were never returned.

21. *People of the State of Illinois* v. *Wesley Ward* (Peoria City Cir. Co., Peoria, Ill., September, 1970).

In June of 1969 the authorities seized 400 magazines from the defendant. Despite the fact that he was acquitted, the magazines were never returned.

22. *People of the State of Illinois* v. *Clarence Allen Tannahill* (Madison Co., Edwardsville, Ill., October, 1971).

On June 6, 1971 authorities seized 1,500 magazines. Two-thirds of the materials were returned in October of 1971 and the remainder was held by the authorities despite the dismissal of all obscenity charges and a plea to a charge of disorderly conduct.

23. *People of the State of Illinois* v. *Smith and Sanford* (Cir. Ct., Champagne Co., Ill., July, 1970).

Authorities seized 1,000 magazines in March, 1970. The magazines were not released for five months, following the acquittal of the defendant.

24. *State of Oklahoma* v. *Sooner State News Agency* (Dis. Ct., Tulsa Co., Doc. No. CRF 71-1957).

On October 26, 1971 $18,000 worth of books and magazines and other materials were seized by the authorities. The indictment was subsequently dismissed on the ground that the materials were constitutionally protected. However, the materials were never returned to the defendant.

25. *People of the State of New York* v. *Bruce Allen Rosokoff* (City Ct., Syracuse, March, 1972).

On March 3, 1972 authorities executed a search warrant which did not name any publication. Approximately 120 magazines and books were seized and are still in the custody of the district attorney.

26. *State of North Carolina* v. *Bryant* (Super. Ct. and Dist. Appellate Ct., Greensburrow, N. Car.).

On May 18, 1971 authorities seized 4,000 magazines and reels of film from 3 bookstores. The materials were not released until January 28, 1972, eight months later, when the defendant was acquitted.

27. *State of Ohio* v. *John Marshall and Queens City News* (Ct. of Com. Pleas, Hamilton Co., Doc. No. B-7279).

On January 20, 1972 authorities seized 1,500 items from a warehouse including books, magazines, newspapers, records, film, and rubber goods. The defendant was indicted on a 41-count indictment involving only 41 items. The materials are still held by the law enforcement authorities.

On October 3, 1972 the court fined the defendant corporation $5,000 on each of the 41 counts in the indictment, for a total of $205,000. In the absence of any provision for a bond to be posted for a corporation, the sheriff was provided a levy of execution and, on December 6, 1972, seized from the corporation's warehouse all furniture, books, magazines, and even a Christmas tree. These materials, according to state statute, were to be sold at public auction in order to pay the fine. However, the district attorney, deciding that the books are not obscene, has indicated that they will not be sold as required by law.

28. *Commonwealth of Kentucky* v. *James Cornett and Stanley Marks* (Cir. Ct., 17th Jud. Dist., Compbell Co., Ky., Doc. Nos. 13768-13770).

In this shocking sequence of cases, the defendants' bookstore was raided and all books and magazines removed three times in the space of four days. Without a warrant, a police officer glanced at a book and two magazines and decided they were obscene. Upon his order, other police officers and the Commonwealth attorney seized all of the books and magazines, as well as the defendants' business license, United States currency, letters and other business records, and several 45 rpm. records. These materials were all removed in tractor trailer trucks on October 15, 1970.

On October 17, 1970 the store was partially restocked and reopened. The police officers, learning that the store had reopened, arrested the clerk and seized all of the magazines then on the premises without a warrant and without even examining the materials.

On October 19, 1970 the store reopened with a total of 21 magazines on the premises. Again police officers arrested the clerk and seized the magazines without first examining them and without a warrant.

Finally, on November 6, 1970 the United States District Court for the Eastern District of Kentucky granted injunctive relief against future seizures. At a motion to suppress held in the Circuit Court for the State of Kentucky, Campbell County, the Commonwealth Attorney admitted under oath that he did not understand the meaning of the legal terms obscenity and prior adversary hearing.

The motion to suppress was overruled, all materials are still retained by the State and despite subsequent purchases and indictments, no case has yet come to trial.

29. *State of Ohio* v. *Terry Barnett* (Mun. Ct., Hamilton Co., Doc. Nos. 831, 1209, 1210).

On June 14, 1972 authorities seized 54 magazines, 8 reels of film, and 8 motion picture projectors. These materials are still in the possession of the police and county prosecutor who refuse to return them to the defendant.

30. *Commonwealth of Kentucky* v. *Odis Hatfield and Charles Abrams* (Cir. Ct., Scott Co., Georgetown, Ky. Doc. No. 13843).

On January 28, 1971 authorities raided a theater under a general search warrant and seized 9 reels of film. No adversary hearing was held prior to the seizure. A motion to suppress is pending and the films are still retained by the authorities.

31. *People of the State of California* v. *Parker* (Super. Ct., Los Angeles Co., Dept. 116, Doc. No. A270-417, February 16, 1972).

On March 6, 1971 authorities seized 99 motion picture films. Subsequently, the defendant was acquitted and the films held to be constitutionally protected. However, the films were not returned to the defendant until March 16, 1972, one year later.

32. *Raro, Inc.* v. *Goodman et al.*, (U.S.D.C., S.D.Fla., Doc.No. 72-781, August 15, 1972).

In *Raro, Inc.* 4,000 books and magazines—the entire content of the bookstore—were seized after a sham adversary hearing in the store on May 12, 1972. The District Court ordered the materials returned almost five weeks later.

33. *United States* v. *Bilthels et al.*, (U.S.D.C., C.D.Cal., Doc.No. 6884-CD).

In *Bilthels* First Amendment materials were seized and never returned. No adversary hearing ever preceded the seizure. Of 30 separate counts in the indictment, convictions were obtained on only 8 counts.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1272

G.I. DISTRIBUTORS, INC., ALVIN DRUSS and IRVING HERMAN,

Petitioners,

against

RICHARD H. KUH, in his capacity as District Attorney of New York County,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Preliminary Statement

This brief is in response to a petition for a writ of certiorari seeking review of a judgment of the United States Court of Appeals for the Second Circuit (Friendly, C.J., Lumbard, J., with Feinberg, J., dissenting), entered December 20, 1973, which affirmed, following a remand by this Court, its judgment entered November 14, 1972, reversing a judgment of the United States District Court for the

Southern District of New York (WEINFELD, J.), entered January 19, 1972.

The District Court judgment had ordered respondent's predecessor, Frank S. Hogan, to return to petitioners 19,000 copies of 55 magazines which had been removed from petitioners' warehouse pursuant to a search warrant issued by a judge of the Criminal Court of the City of New York, after his determination in an adversary hearing that there was probable cause to believe the magazines obscene.*

Question Presented

Whether a violation of the First Amendment occurs where undistributed magazines are restrained overnight in a wholesaler's warehouse pending the outcome of an adversary hearing held the following morning, after which probable obscenity of the magazines is found.

Statement of the Case

The Overnight Quarantine

G.I. Distributors, Inc. is a wholesale distributor of what it terms "sexually oriented" books and magazines; Alvin Druss and Irving Herman are officers of the corporation.

While executing a search warrant on January 6, 1972 for business records of G.I. Distributors (hereinafter G.I.) which it was believed would contain evidence of G.I.'s unlawful wholesale promotion of obscenity, a class D felony

* On February 13, 1974, Richard H. Kuh succeeded Frank S. Hogan as the District Attorney of New York County. Michael Codd had previously succeeded Patrick Murphy as Police Commissioner of the City of New York.

under New York Penal Law §235.06, and for copies of magazines theretofore deemed obscene by judges of the New York City Criminal Court, police discovered in G.I.'s Long Island warehouse 19,000 copies of the magazines they were seeking.[1] Since the magazines were sought as evidence of G.I.'s felonious wholesale promotion of obscenity, the 19,000 copies would constitute damaging proof of the corporation's unlawful wholesaling.

The search was being conducted with the supervision of the District Attorney of New York County, and immediately upon the discovery of the large cache of magazines it was understood that the decision of this Court in *A Quantity of Books* v. *Kansas* [378 U.S. 205 (1964)] appeared to bar a long-term restraint of such a vast number of magazines without there being accorded an adversary hearing to their owners. Thus G.I. and their attorney were then notified that an adversary hearing into the probable obscenity of the magazines would be held the following morning in the New York City Criminal Court and, pursuant to the search warrant, 6 copies of each of the 55 magazines were seized as specimens.

Fearful that a huge volume of hard-core pornography would be spirited away by petitioners—themselves charged with felonies[2]—before the hearing could be held the follow-

1. The original appeal before the Second Circuit did not concern the District Court's rulings regarding the seized business records and 330 specimen magazines (6 copies each of the 55 magazines). For the sake of conciseness, only the facts relating to the 19,000 magazines are set forth herein; many of the facts not applicable to the appeal can be found in the opinion of the District Court, which has been reproduced in petitioners' brief and is reported at 336 F.Supp. 1036 (S.D. N.Y. 1972).

2. On the night of January 6th petitioners Alvin Druss and Irving Herman were arrested and charged with the felonious wholesale promotion of obscenity; they were subsequently indicted on that charge.

ing morning, the law enforcement authorities quarantined the 19,000 magazines overnight by stationing a police officer on the warehouse premises overnight to ensure against a sudden removal of the magazines which would render the next day's hearing largely academic. This course was adopted, rather than removing the magazines from the warehouse, so as to impose the least disruption of G.I.'s operations in the event that the magazines or some of them were found not to be obscene in the adversary hearing.

The Adversary Hearing

The following morning, January 7th, an adversary hearing was held before Judge Bernard Moldow in the New York City Criminal Court. Petitioners' attorney, Herald Price Fahringer, Esq., participated in this hearing, arguing at length that the magazines were not obscene.[3] After examining each of the magazines and hearing the contentions of both sides, Judge Moldow concluded that there was probable cause to believe every one of them was obscene. He then issued a search warrant again authorizing the seizure of the remaining 19,000 copies of the 55 magazines he had examined. The warrant was executed that same day, and the magazines were taken as evidence in the felony prosecutions then pending against petitioners G.I., Herman and Druss.

The Federal Action

On January 10th petitioners commenced an action in the United States District Court for the Southern District of

3. Petitioners' attorney refused to stipulate to the inclusion of the minutes of the adversary hearing as an exhibit on the appeal in the Second Circuit. Thus, details regarding the hearing are not part of the record sought to be certified.

New York, naming former District Attorney Hogan and former New York City Police Commissioner Patrick Murphy as defendants and seeking, *inter alia*, the return of the 19,000 magazines and other property taken from them. At no time prior to their bringing of the federal action had petitioners sought to avail themselves of the identical injunctive relief open to them in the courts of New York State.

The District Court concluded that the overnight restraint of the magazines had constituted a seizure, and reasoned that *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), *cert. denied* 397 U.S. 920 (1970), had been violated because the seizure had preceded the next day's hearing rather than *vice versa*. The District Attorney was directed to return the magazines; the order also enjoined petitioners "as a condition of the granting of their application * * * from disposing of any of the * * * material directed to be returned, so that they will be available for subpoena in the State prosecution."

Stays of the District Court order pending appeal were denied by the Second Circuit on January 26th, and by Mr. Justice Blackmun on January 28th.

The Original Decision of the Court Below

After full oral argument the Court of Appeals on November 14, 1972 issued a decision reversing the judgment of the District Court. The opinion of the court was written by Judge Lumbard, with Chief Judge Friendly concurring, and Judge Feinberg dissenting in a separate opinion. Reported at 469 F.2d 752, the decision is reproduced in the brief for petitioners.

Stating that its decision was "a limited one," and that "[b]ecause of the incomplete record on appeal, we have no basis on which to question adequacy of the hearing," the court stressed that it was deciding "only that the brief and insubstantial prior restraint which occurred here, followed a few hours later by a hearing, notice of which has been given to those in possession of the alleged obscene publications, does not violate the First Amendment."

In reaching this result the court concluded that the overnight quarantine "did not present the interference condemned in *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961) and *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964)," and that "[n]othing our decisions in *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970) or *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969) is inconsistent with the result we reach here."

In reversing the lower court the Court of Appeals did not direct it to reinstate the District Attorney's possession of the 19,000 magazines. In fact, the Court of Appeals noted (opinion, fn. 7) that "[a] further question is whether the magazines returned to the appellee [petitioners] pursuant to the district court's order have now been distributed to retailers, thus rendering the appeal moot * * *," and that "thus there is a live issue whether appellant can retake them pursuant to the state judge's order."[4]

The dissenting opinion of Judge Feinberg conceded that "[a]s a matter of common sense, there is a good deal of

4. The Second Circuit stayed the issuance of its original mandate pending this Court's disposition of the original petition for certiorari, and respondent was precluded from applying to the District Court for an order reinstating respondent's custody of the magazines in controversy.

merit in the majority's position that the prior restraint here was so 'brief and insubstantial' that it did not 'violate the First Amendment,' " but opted for the requirement of a *prior* adversary hearing in all cases because "[t]his furnishes a clear, easily applied test of constitutional validity * * *."

The Decision After Remand

Following the Court of Appeals' original decision, petitioners applied to this Court for a writ of certiorari to review that judgment (No. 72-872). In a memorandum dated June 25, 1973 (and reproduced in petitioners' brief as Appendix A), this Court granted the petition for certiorari, vacated the Court of Appeals' judgment, and remanded the case to the Court of Appeals for further consideration in light of the eight obscenity decisions handed down by this Court in June of 1973.

After the remand the case was reconsidered by the Court of Appeals upon new briefs submitted by the parties and without oral argument. On December 20, 1973, the Court issued a decision affirming its original judgment (reproduced in petitioners' brief as Appendix B and as yet unreported). It held that "Having given careful consideration to these decisions [this Court's June 1973 obscenity decisions], we conclude that they do not require us to alter our prior opinion."

POINT

The issue tendered by petitioners is insubstantial, has been mooted by the subsequent distribution of the subject magazines and dismissal of the indictments against petitioners, and in any event was decided correctly by the court below.

The Controversy Is Academic

Upon reconsideration following this Court's remand of the case, the Court of Appeals was informed that the subject matter of the controversy—the 19,000 magazines—had been distributed. Custody of the magazines had been restored to petitioners following the District Court decision, and was not transferred to the District Attorney after the original reversal by the Court of Appeals, which stayed its mandate pending disposition of the original petition for certiorari. Sometime between the issuance of the District Court order and the Court of Appeals' decision after remand, the magazines were distributed by petitioners and now are irretrievably dispersed in the national marketplace:

> "As to the 19,000 magazines, we have recently been advised by the parties that they were shipped back to the suppliers of G.I. Distributors after the District Court held the police actions unconstitutional and ordered the magazines returned to G.I. Distributors." *G.I. Distributors* v. *Murphy*, —— F.2d ——, fn. 2 (2d Cir. 1973).

Thus, the entire *res* of the controversy can no longer be made subject to this Court's determination, and the Court is asked by petitioners to decide the tendered issue *in vacuo*.

Moreover, the State indictment against petitioners which had charged them with felonious wholesale promotion of obscenity (Indictment No. 492/72, New York County) was dismissed on January 28, 1974. There remains no pending criminal prosecution in which the 19,000 magazines, originally seized as evidence of petitioners' wholesale promotion of obscene materials, may be introduced.

The Issue Is Insubstantial

Whether an adversary hearing must *precede* a restraint of possibly protected expressive matter in every instance or whether, as the court below originally held, the hearing may follow a restraint that is "brief and insubstantial," is not "an important question of federal law" (Supreme Court Rule 19), but rather an issue of little significance outside the confines of the instant case.[5] It is an issue arising from unique facts unlikely to reoccur (the overnight quarantine of magazines in a wholesaler's warehouse in anticipation of an adversary hearing held the following morning—about which even the dissenting judge confessed he could "not pretend to be outraged"), which stimulated only a "limited" holding, and rested, even on the original petition, on an "incomplete record on appeal" (quotations from the original decision of the Court of Appeals).

The Decision of the Court of Appeals Is Correct

Manifest in the decision of the Court of Appeals after remand as well as in its original decision is a conclusion according fully with the constitutional guidelines established by this Court. See *Heller* v. *New York*, 413 U.S. 482, 491 (1973).

5. Assuming that adversary hearings are constitutionally required at all. See *Heller* v. *New York*, 413 U.S. 482, 491 (1973).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1974

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FRANK S. HOGAN, Individually and in his Capacity as District Attorney of New York County,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Certain misstatements in the respondents' brief in opposition require the filing of this reply. The respondents' suggestion that the seizure of the 19,000 magazines and all of G. I. Distributors' business records constituted an "overnight quarantine" is most misleading. In reality these materials were held for over a month until the federal district court intervened and directed their return.

The "Hearing"

The belated offering of a "hearing" after the seizure was in all respects a sham. The seizure took place on January 6, a Thursday, and the matter was adjourned in the criminal court until Monday, January 10. At that time counsel did not participate in any proposed hearing as respondent suggests (Res. Brf. at 4.) On the contrary, petitioners' counsel urged that the New York Criminal Court had no jurisdiction to hear the matter. The District Attorney sought a warrant under §6330 of the New York Civil Practice Law and Rules which authorizes the destruction of any obscene material. Section 6330, however, provides that the proceeding must be brought in the state supreme court, not in the criminal court.

Although counsel argued the magazines were constitutionally protected, that position was subordinated to the complaint that the criminal court lacked jurisdiction to hear the matter — a position confirmed in *Milonas* v. *Schwalb*, 65 Misc.2d 1042, 319 N.Y.S.2d 327 (Sup. Ct., N.Y.Co., 1971). In any event the criminal court judge only examined the magazines and thereafter issued the warrant. Clearly, no valid hearing was offered petitioners.

"Fear that the Magazines Would be Spirited Away"

There was absolutely no danger that G. I. Distributors, one of New York City's largest distributors of magazines, would "spirit away" 19,000 magazines to avoid prosecution. That desperate argument made by the prosecution is preposterous. The District Attorney already had six copies of each magazine necessary for the prosecution of their felony charges.[1] Consequently, it would

[1]The New York Penal Law provides in subsection 2 of section 235.10 that, "A person who posesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same."

make no sense at all for G. I. Distributors to try to hide 19,000 magazines, assuming they could find a place to store them.

Controversy Not Academic

Although G. I. Distributors, out of an abundance of caution, returned the 19,000 magazines to the publisher after the district court injunction, the issues presented here are by no means academic. For the Second Circuit's decision has left a deep gash in the adversary hearing doctrine so essential to the uninterrupted circulation of books in a free society. Had the appropriate procedures designed by this Court been followed, the drastic restraints imposed here would have been avoided. If the court of appeals decision stands uncorrected, further excursions into the protected precincts of the first amendment are bound to occur.

Other Cases Pending Before this Court

This Court's recent grants of certiorari in *Hamling* v. *United States*, No. 73-507; *Jenkins* v. *Georgia*, No. 73-557; and *Southeastern Promotions Ltd.* v. *Conrad*, No. 73-1004, indicate the need for further regulation in this complex area of the law. Moreover, the Court, on March 18, 1974, noted probable jurisdiction in a §1983 action virtually identical to ours which involved the seizure of a motion picture film without a prior adversary hearing. *Huffman* v. *Pursue, Ltd.*, 73-296. And because this is the only case returning to the Court since its June, 1973 obscenity decisions which involves a massive seizure of books without a prior adversary hearing, it is particularly appropriate that this case be heard along with the others.

Since the adversary hearing plays such a vital role in guarding what the public will be allowed to read and see, it must constantly be refortified. Consequently, a grant of certiorari in this case will afford the Court an opportunity to galvanize that principle. If the court of appeals judgment is left undisturbed,

further official lawlessness will be sponsored and no book or magazine will be safe. For all these reasons the petition for certiorari should be granted.

Dated: Buffalo, New York
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